

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRAVIS L. SOUTHARD

Claimant

VS.

SUN VALLEY, INC.

Respondent

AND

AMERICAN INTERSTATE INSURANCE COMPANY

Insurance Carrier

Docket No. 1,053,906

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the August 24, 2012, Order entered by Administrative Law Judge (ALJ) Thomas Klein. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 31, 2012, regular hearing and exhibits thereto; the transcript of the August 23, 2012, motion hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

On August 23, 2012, a motion hearing was held on respondent's application to extend its terminal date beyond June 4, 2012. ALJ Klein issued an August 24, 2012, Order extending respondent's terminal date to October 23, 2012, for good cause shown. He ordered that respondent pay temporary total disability (TTD) benefits commencing June 4, 2012, through October 23, 2012, based on an average weekly wage of \$432.00. Claimant was granted reasonable time to respond to any new evidence.

Respondent appealed the ALJ's Order, contending in its brief that ALJ Klein lacked jurisdiction to award claimant TTD benefits and that the Board has jurisdiction to review this

issue. Claimant filed no brief, but argued at the motion hearing that the Kansas Workers Compensation Act permitted the ALJ to award claimant TTD benefits.

The issues before the Board are:

1. Does the Board have jurisdiction to review the issue of whether the ALJ exceeded his jurisdiction by ordering TTD benefits paid to claimant?
2. If so, did the ALJ exceed his jurisdiction by ordering TTD benefits paid to claimant?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

Claimant alleged back and general body injuries sustained in a September 21, 2010, work-related motor vehicle accident. On November 15, 2011, a prehearing settlement conference was held. The prehearing settlement worksheet indicated no temporary total disability benefits were paid and the only issues remaining were claimant's average weekly wage and the nature and extent of claimant's disability.

A regular hearing was held on January 31, 2012, at which time the parties again stated the primary issues were claimant's average weekly wage and the nature and extent of claimant's disability. Testimony was taken of claimant at the regular hearing. ALJ Klein set claimant's terminal date for March 6, 2012, and respondent's terminal date for April 5, 2012. Claimant took depositions of Dr. C. Reiff Brown on February 3 and 27, 2012, and Dr. Robert Barnett on February 3, 2012.

On April 3, 2012, respondent filed an Application for Extension of Terminal Date to extend its terminal date from April 5, 2012, to June 4, 2012. On May 1, 2012, claimant filed his submission letter. In an Order for Extension of Terminal Date filed on May 18, 2012, ALJ Klein granted respondent's application to extend its terminal date to June 4, 2012. Respondent filed another Application for Extension of Terminal Date on May 31, 2012, to extend its terminal date to July 23, 2012. The reason given for requesting an extension was to obtain claimant's employment records for the 15 years prior to his accident and to depose witnesses.

Respondent filed another Application for Extension of Terminal Date on July 16, 2012, citing the same reasons for the application as it did in its May 31, 2012, application. An August 23, 2012, motion hearing was held at respondent's request to take up its Application for Extension of Terminal Date. The only issue raised at the motion hearing was respondent's request to extend its terminal date. Respondent proffered that claimant had 52 jobs in the 15 years prior to his accident and respondent had contacted all of them,

but some employers had not responded. It indicated there were inconsistencies in the employment information in the report of claimant's expert, Dr. Barnett, and that was why it was necessary to obtain claimant's employment information.

Claimant objected to respondent's request. He contended that respondent's terminal date had expired on June 4, 2012, as respondent filed its application on July 16, 2012. Respondent countered by arguing it had filed an application on May 31, 2012, which was before June 4, 2012.

At the motion hearing the following discourse took place between ALJ Klein and the parties:

THE COURT: What are the issues, well, let me look at this. Here's what I am thinking. I am thinking that I grant an extension for like 30 days, but that I go back to June 4th and make you start paying temporary total from then until you are done so that we are not just sitting here.

MR. TORLINE: On what basis would the claimant be entitled to TTD?

MR. RICE: Statute says that he can.

THE COURT: Well, because my Order would say that, I suppose, would be the basis.

MR. TORLINE: Well, again, my client then is getting penalized simply because they are trying to defend this case. And I don't think that's proper.

THE COURT: That's what I am thinking about doing. Is that going to be enough time?¹

ALJ Klein ordered TTD benefits commencing June 4, 2012, through October 23, 2012, based on an average weekly wage of \$432.00. This was not requested by claimant. Claimant never asserted he was temporarily and totally disabled from June 4, 2012, thereon.

PRINCIPLES OF LAW AND ANALYSIS

It first must be determined whether the August 24, 2012, Order of ALJ Klein is a preliminary hearing order or an interlocutory order. Here, a motion hearing was conducted for the purpose of determining if respondent's terminal date should be extended. That motion hearing was held subsequent to the regular hearing and after the terminal dates had expired. ALJ Klein's Order granted respondent's request to extend its terminal date,

¹ M.H. Trans. at 16-17.

but also ordered respondent to pay claimant TTD benefits. Under K.S.A. 2010 Supp. 44-523(b) an ALJ may extend terminal dates for good cause shown and under K.S.A. 2010 Supp. 44-523(b)(1) an ALJ may grant an extension if TTD benefits are being paid to claimant. K.S.A. 44-534a(a)(2) grants an ALJ authority to issue a preliminary order for medical treatment and temporary total disability benefits.

After the preliminary hearing stage, the determination of the employee's rights under the Act proceeds to a final evidentiary hearing. K.S.A. 2009 Supp. 44-523. Prior to this hearing, the ALJ is required to set a terminal date for the parties to submit evidence in support of their respective positions. K.S.A. 2009 Supp. 44-523(b). Any evidence submitted after this terminal date cannot be considered as part of the final evidentiary record. (Citations omitted.)²

In *Cook*,³ the Board found that an order extending terminal dates was an interlocutory order and stated, "An Order extending terminal dates is not a finding of compensability, nor is it a determination of any of the issues presented to the SALJ at the regular hearing. It is neither a preliminary award of benefits under K.S.A. 44-534a, nor a final award under K.S.A. 44-523." The Board has consistently held that an order extending terminal dates is an interlocutory order.⁴ The Board finds that ALJ Klein's August 24, 2012, Order is an interlocutory order and, therefore, the Board has no jurisdiction to review it.

Even if ALJ Klein's August 24, 2012, Order was a preliminary order granting TTD benefits, the Board has no jurisdiction to review it. The Board acknowledges that pursuant to K.S.A. 2010 Supp. 44-551(i)(2)(A), the Board has jurisdiction to review decisions from a preliminary hearing in those claims where the ALJ exceeded his or her jurisdiction. However, as stated above, K.S.A. 44-534a grants ALJs the authority to order a respondent to pay TTD benefits. In addition K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified.

K.S.A. 2010 Supp. 44-523(b)(1) gives the ALJ authority to grant a respondent an extension to submit its evidence if the employee is being paid temporary or permanent total disability compensation. The ALJ ordered the TTD benefits in order to grant respondent's request for an extension. Without being required to pay TTD benefits pursuant to K.S.A. 2010 Supp. 44-523(b)(1) respondent could not be granted an extension. A mere contention by one of the parties that the ALJ exceeded his authority by awarding the

² *Roles v. Boeing Co.*, 43 Kan. App. 2d 619, 628, 230 P.3d 771 (2010).

³ *Cook v. State of Kansas*, No. 1,052,116, 2012 WL 4040461 (Kan. WCAB. Aug. 16, 2012).

⁴ *Portillo v. Carl Cole Masonry*, No. 220,294, 1999 WL 292840 (Kan. WCAB Apr. 16, 1999); *Horn v. City of Topeka*, No. 241,878, 2004 WL 1810303 (Kan. WCAB July 16, 2004); *Cook v. State of Kansas*, No. 1,052,116, 2012 WL 4040461 (Kan. WCAB Aug. 16, 2012).

payment of TTD benefits does not automatically grant the Board jurisdiction over the matter.

CONCLUSION

ALJ Klein's August 24, 2012, Order is an interlocutory order that the Board has no jurisdiction to review. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁵ Accordingly, respondent's appeal is dismissed.

WHEREFORE, the Board dismisses respondent's request to review the August 24, 2012, Order entered by ALJ Klein for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of November, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Thomas Klein, Administrative Law Judge

⁵ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).